THE EXAMINATION OF TITLES IN VIRGINIA.

UNLESS very recently begun, little opportunity is afforded by the various law schools throughout the country for practical work in the examination of titles. Presumably, it is believed that knowledge of this subject can only be acquired by long experience, for upon no other ground could it be considered as beyond the proper scope of the course. But the graduates immediately encounter much of this work, and have great difficulty in its transaction for lack of prior instruction. They must perforce follow the varying standards and practises of their several communities, and much that is inefficient and dangerous is thus perpetuated. Nor is there any progress in the science, except what is developed by the requirements of supervising counsel, now usually employed by money lending corporations, who with practical unanimity insist upon requirements regarded by the average examiner, according to the lax standards of his community, as captious and unreasonable.

Employment to examine and abstract a title usually includes the performance of the duties of a counsellor in advising as to whether the title is a "good and valid" one in the parties represented as the owners of the land.

The attorney should distinguish carefully between the two dissimilar capacities in which he is acting, and be sure that he forms no opinion as counsel until, as an abstractor, he has completed his abstract in a manner sufficiently full to constitute the only matter considered in reaching his conclusions as counsel. When these duties are begun nothing should be considered but what appears therein, as if it had been prepared by another, and he had no knowledge of the land or its title. Only in this way can his dissimilar functions be performed with justice to himself and his client. So difficult is this separation, that when the value of the land and other circumstances permit, a client should be advised to employ one attorney as abstractor and another as counsel.

AN "ABSTRACT OF TITLE."

The examination of a title should be regarded as an *in rem* proceeding, and no prejudice should be permitted in favor of finding that a particular individual has a particular estate. The abstract of the examination should contain a brief summary of the essentials of every recorded document or entry affecting the land in question, with such pertinent notes as may be necessary to make the summary completely comprehensible to the average lay reader, and with such additional matter *in pais* as may be necessary to supplement record deficiencies. Added to this should be non-essential information which the abstractor supposes to be of interest to his client, in view of his special plans with reference to the land.

The certificate of the abstractor is to be appended thereto and should contain a statement that the abstract is a true representation of the present state of the title to the land in question. The latter is identified by a meticulous description on the first sheet of the abstract, known as the caption. When the certificate goes further than this and expresses the opinion of the abstractor as to the validity of the title in any person, then he is acting as counsellor and not as an abstractor.

When employed to report upon a title the attorney should be careful to have an understanding that, in addition to the established compensation for the examination of records and report of the examination, additional compensation will be due for investigation *in pais,* and for the rendering of an opinion as counsel, should the necessity arise for service of these last classes.

The discussion in this paper will not extend to suggestions (except of the most general character) with respect to the duties of counsellor.

THE LOCATION OF THE LAND.

Frequently an indefinite or mere general description is furnished. In such cases the attorney should request a copy of the contract of sale or loan agreement, or such other information as will insure a correct location of the land, its precise metes and bounds, the consideration to be paid or amount to be loaned, the

supposed quantity of land, the admitted encumbrances or defects in title, the supposed improvements, and the supposed present owner of record. If obtainable the last prepared abstract of title should be furnished, but its use should not be extended beyond that of aiding in the construction of the chain of title. If the client does not know the present owner, he can be ascertained from the occupant, the agent, neighbors, the land books (if city property precisely described), or the Commissioner of the Revenue or County Treasurer (if county property). If he is not thus disclosed, but a former owner can be identified, the title may sometimes be traced to the present owner through the land books or the indices to the deed books. It is important to secure this information at the first interview with the client, to avoid later questions at a time when he supposes the work in progress.

CHAIN OF TITLE.

The next step is to prepare the chain of title. No attempt should be made to construct it upon the sheets which will constitute the abstract, for the notes of the abstractor must be more copious and no fair opinion may be had as to the materiality of an item until the completion of the examination. Having proceeded to the Clerk's Office of the Court of Record of the County or City in which the land, or a part thereof, lies, the abstractor should first locate the deed by which title passed into the present owner. This is done by reference to the grantee index to the deed books. This deed should be carefully read and notes taken in writing of the essential elements thereof. These notes should include:* (1) date of deed;[1] (2) parties and their residences as recited in preamble;[2] (3) the consideration;[3] (4) the warranty;[4] (5) which parties grant and war-

*Throughout this paper a reference will follow statements that certain matters are material and should be noted. This reference is intended to demonstrate only one element of materiality, but the careful reader will observe, as a rule, additional consideration, rendering the note important to the abstracter.

[1] Va. Code 1904, § 2473.

[2] 2 MINOR, REAL PROPERTY, § 1109.

[3] Va. Code 1904, §§ 2458, 2459.

[4] Id., §§ 2445-2448.

rant if all parties of first part do not, and defects in granting clause;[5] (6) the literal description; (7) the grantee and the estate conveyed if less than the fee simple, and the nature of any exceptions, reservations, restrictions and conditions; (8) the covenants of title;[6] (9) absence of recital as to seals;[7] (10) the literal signatures;[8] (11) omitted seals;[9] (12) parties failing to acknowledge, dates of acknowledgments, name and office of certifying officials and irregularities in certificates, or (if no acknowledgments) mode of proof in detail.[10]

The certificate of the clerk should be read, and the date of admission to record, and the number of the deed book and page number should be noted.[11]

If a deed, as transcribed, appears defective, the notation usually found on the margin of the deed book, as to whom delivery of the original was made, should be recorded, so that it may be located, and the transcription corrected or the originals re-executed by the parties. Though this deed contains a reference to the preceding link in the chain of title, the grantor index to the deed books should be referred to, to verify correct indexing or in its absence to require the clerk to make a correct entry, for the benefit of future examiners. If no reference to the preceding link appears, it should be found by reference to the grantee index, and if thus located the grantor index should be examined to verify correct entry there. After locating the deed which is the next link in the chain, the process of examination of the same should be conducted as above indicated. But if the indices fail to disclose the preceding link the gap thus created is attributable to an error in indexing, to a failure to record the deed or more likely to an acquirement of title by descent or devise.

When by examination of the index to the will books a will

[5] Id., §§ 2437, 2438, 2286a, 2288b, 2502.
[6] Id., §§ 2449-2452.
[7] Bradley Salt Co. *v.* Norfolk, etc., Co., 95 Va. 461, 28 S. E. 567.
[8] Va. Code 1904, §§ 2502, 2503.
[9] Burnette *v.* Young, 107 Va. 184, 57 S. E. 641.
[10] Va. Code 1904, §§ 2500-2501f, and additional validation acts subsequent to Code.
[11] Id., § 2505.

is encountered by which title was transmitted, the notes of the abstractor should include: (1) name and residence of maker;[12] (2) pertinent devises showing literal terms and conditions of estates, if less than fee simple; (3) facts as to family status and relationship;[13] (4) whether pretermitted children provided for;[14] (5) whether provision in lieu of dower;[15] (6) executors and trustees appointed, and their powers if pertinent;[16] (7) date of will;[17] (8) whether holograph, and if not, how executed and authenticated (include literal signatures of all).[18]

The order of probate and certificate of qualification should then be read and notes taken of: (1) jurisdictional facts alleged, proof of execution and whether probate was *ex parte* or upon notice, and if the latter, an abstract of the record should be included;[19] (2) personal representative qualifying, and date and manner thereof.[20]

When the transmission of title is by descent, there being no will or deed, all record information to establish the fact of death (intestate) and the date thereof should be noted from the Index of Appointments of Personal Representatives, from the records of the Registrar of Vital Statistics or City Health Department, or the list of heirs filed by personal representatives.[21] And both in this case and that of transmission by devise, all record information as to the heirs and spouse surviving should be gathered as disclosed by the above sources, by the Marriage Register or by recitals in recorded instruments *inter partes*. In default of conclusive information from these sources affidavits should be secured from disinterested friends or relatives establishing the true course of descent, or the conclusive validity of the devise.[22]

If no trace can be found of the manner of transmission of title, and the last known owner cannot be reached for the purpose of personal inquiry, then old plats, local public officials, neighbor-

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[12] Id., §§ 2512, 2513.
[13] Id., §§ 2517, 2523.
[14] Id., §§ 2527, 2528.
[15] Id., § 2559.
[16] Id., §§ 2642, 2663.
[17] Id., § 2517.
[18] Id., §§ 2514, 2516, 2529, 2530, 2531.
[19] Id., §§ 2532-2547.
[20] Id., §§ 2637-2646.
[21] Acts 1916, page 507.
[22] Va. Code 1904, §§ 2548-2561.

hood residents or the Land Books may throw light upon the subject.

The examination of the records of suits, in which the land appears to have been involved, should not be undertaken until the chain of title and the examination for adverse claims and liens have been completed, for these records cannot be examined intelligently until all parties in interest have been identified. The search for adverse claims and liens should not be begun until the complete chain of title has been constructed.

SEARCH FOR ADVERSE CLAIMS OF TITLE.

In making the search for adverse claims of title (which will lead to the discovery of certain liens hereinafter specified) it is impracticable to do more than search the indices to the deed books [23] and will books.[24] It is almost impossible to search through the books themselves. So, while indexing is not essential to constructive notice by recordation of an adverse deed, as it is for judgments, *lis pendens* and attachments,[25] the bond of the clerk of the court, whose duty it is to index the same, must be relied upon for protection.

In the grantor index to the deed books will be found, in addition to deeds: (1) deeds of trust, mortgages and vendor's liens; [26] (2) contracts to convey and leases for more than five years; [27] (3) powers of attorney; [28] (4) partitions, judgments for land, and in condemnation proceedings, assignments of dower, also *lis pendens* and attachments; [29] (5) miscellaneous liens; [30] (6) conveyances pursuant to tax sales; [31] in fact *all* adverse claims of title, except those arising by will or descent, *liens* arising out of money judgments, mechanics' claims, Mutual Assurance Society assessments, and taxes where no sale has been had.

After the chain of title has been completed an outline should be prepared listing the names of all owners of estate in the land, and opposite each name should be entered the date when he ac-

[23] Id., § 2505.
[24] Id., §§ 2547, 2547a.
[25] Id., §§ 3561, 3566; Vicars *v.* Sayler, 111 Va. 307, 68 S. E. 988.
[26] Va. Code 1904, §§ 2465, 2474.
[27] Id., §§ 2463-2465.
[28] Id., §§ 2499, 2500, 2509.
[29] Id., §§ 2510, 1105f, 3561, 3566.
[30] Id., § 2485.
[31] Id., § 2505.

quired title[32] and the date when the instrument was recorded passing his estate.[33] It is well to add a year arbitrarily to this last date, since it entails little additional investigation and constitutes a protection against the retroactive effect of recordation under the old Virginia statutes [34] and against slight index errors.

The grantor index should then be examined as to each person for the period in question and a note made of the book and page number of all his conveyances or all entries against him. After completing this, the deed books should be consulted, and all entries or instruments not affecting the land in question checked off, while notes are made of the material ones as in the preparation of the chain of title. These are to become (unless shown to be now of no effect) the starting point of an ancillary examination to ascertain the final disposition of each adverse claim.

Where index entries are not borne out by the deed books correction should always be required of the clerk. Where these mistakes occur the grantee index, or the indices in the deed books themselves will usually lead to the true whereabouts of the lost instrument. The attorney should read carefully every possibly adverse conveyance, and should not content himself with merely a casual reading, which is dangerous.

Liens should always be noted and if released by marginal entry,[35] the entry should be copied literally; if released by deed,[36] complete notes of the same should be taken for comparison with the instrument creating the lien. If no release is recorded but the claim is known to have been satisfied, a release should be required. If the instrument creating the lien has been executed by sale it will have been abstracted as a part of the chain of title. This abstract should include a description of the notes evidencing the indebtedness, the express terms of the powers of the trustee and the rights of the noteholder, for comparison with the deed executed under the power of sale, which is of course void, if the sale was not strictly in accordance with the power.

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[32] Id., § 2473. [33] Id., § 2465.

[34] Id., § 2467 (now repealed); see provisions of earlier codes.

[35] Id., § 2498, as amended by Acts 1916, page 703.

[36] Id., § 2439.

The indices of the will books must be examined, to verify each passage of title by descent by the ascertainment that no will is recorded affecting such descent adversely. In conducting the examination of the indices to the deed books, the *daily indices* [37] should not be overlooked.

SEARCH FOR ADVERSE LIENS.

Having completed the search for adverse claims of title and made complete notes thereof, the search for adverse liens should be made. The sources of this search include that of the defendant indices to the judgment docket books,[38] to the mechanics lien [39] and Mutual Assurance Society lien books [40] if the land is improved; and also the indices to, or pages of, the various books containing the tax record of the land, which will be referred to in detail hereafter.

The defendant indices to the judgment docket books should be examined for each person in the chain of title and for each individual disclosed as having an interest in the land adverse to the chain, for the period ending with the transfer of title from such persons, and for the recordation of such transfer. A literal copy should be made of every transcript of a judgment which may be discovered, and also of the entry of total or partial satisfaction of such judgment. Judgments against persons whose given names do not appear in the transcript, but whose initials and surname are similar to those of an individual in interest should be regarded as judgments against such individual; likewise where the given name appears in the transcript but not in the chain of title. Immaterial variations in spelling should not prevent the copying of the transcript, but should be noted. The same procedure should be followed to ascertain possible liens of the Mutual Assurance Society and mechanics liens, where there are improvements on the land.

Before beginning the search for unpaid taxes, the current land book should be secured, of which there is a copy in the office of the Commissioner of the Revenue and also in the office of the Treasurer. A literal copy should be made of the entry

[37] Id., § 2505.
[38] Id., §§ 3559a, 3560, 3561, 3565.
[39] Id., § 2475, 2476, *et seq.*
[40] Id., § 2498b.

there and if it be erroneous, the Commissioner of the Revenue should be required to correct it. The old books, which are found in the Clerk's Office as a rule, should then be examined and a list made of the names of the persons against whom assessments of taxes on the land were made in every year since 1876 (and prior to that year when owned by a non-resident).[41]

The Delinquent Land Books [42] should be examined as to each person in this list for the years in which he was assessed as owner, and copies made of all entries therein possibly affecting the land. Where land has not been sold for taxes but they are overdue and unpaid, the entry will appear in the Delinquent Tax Book.[43] It is becoming customary to note payment of taxes on the land books, and sometimes reference to this is the more convenient method to ascertain whether the taxes for the year just past have been paid.

It must be remembered that mineral lands are assessed with reference to the value of the surface and the minerals separately, in the hands of owners at different times, and that farm lands are listed separately from subdivisions for residence. In cities there are sometimes two sets of Delinquent Books, one for the city and one for the State. There is also another book in which delinquent special levies are recorded, such as paving, culvert, sewerage and sidewalk cellar taxes.

The territorial subdivision of counties into districts and cities into wards is not constant and permanent, so that land may be in different wards or districts in different years. Reference must be had to the ordinances or resolutions in question to check this, and also inquiries must be made of the clerk and of the Commissioner of the Revenue to find out when the changes made by the governing bodies were carried into effect upon the books in their respective offices.

There is no provision for the recordation of liens for unpaid Federal inheritance taxes, but inquiry should be made as to the payment of such taxes where the facts indicate the inquiry to be material; and, of course, inquiry should be made in regard to State inheritance taxes.

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[41] Id., § 632.
[42] Id., §§ 645, 662.
[43] Id., § 611.

SUITS.

Not until after the nature of every adverse claim of title and of every adverse lien has been noted by the abstractor, may he properly examine the records in judicial proceedings affecting the land. These will ordinarily be suits to subject land to the payment of debts, to sell infants' lands, for partition, for condemnation or to quiet title, or actions of ejectment or unlawful detainer. Sometimes the proceedings are less formal, such as petitions by personal representatives or trustees, or motions for the appointment of substitute trustees. And occasionally collateral suits, as for divorce,[44] may be pertinent. In this class of examination falls the examination of the record of proceedings by which land has been sold for delinquent taxes. If a suit cannot be found in the indices to Current or Ended Causes, or if there be an entry there but the papers are not in the files, the Chancery Order Books must be examined and the record of the suit abstracted as completely as may be from the decrees and orders there entered.

Every paper in the files of such causes should be abstracted, notes being made of its nature, date, endorsements and essentials of its contents. Here the duties of the abstractor cease, but unless he has scrupulously performed them, the counsellor coming to advise upon the binding force and effect of the proceedings, is unable to do so. For he must scrutinize every item of this record in the light of the facts disclosed by the remainder of the abstract of title, and apply his knowledge of procedure and of the substantive law involved, in order to discharge his duties.

This discussion presents an apt point at which to advert again to the fact that when one attorney is acting both as abstractor and counsellor, he should complete his duties in the former capacity, before giving any consideration to the problems presented to him in the latter. It seems clear that the judicial attitude then necessary cannot be attained while one is seeking to record with dispatch the voluminous transactions of the usual chancery suit.

[44] Id., §§ 2263, 2264.

THE FORM OF THE ABSTRACT.

The form in which the abstract of the various examinations above described should be finally submitted is within limits a matter of preference with the individual abstractor. Unless the information gathered is so fully presented as to constitute the only matter considered by the counsellor in reaching his opinion as counsellor, then plainly the opinion is not justified by any record; and for one's own protection this is not desirable. Roughly speaking, the abstract should consist of a caption, containing a description and a diagram of the land; a chain of title, with each link on a separate sheet of paper; a list of adverse claims or liens showing their present status; and the certificate of the abstractor as to the scope of his examination, in which is usually included his opinion as counsellor, if he is also acting in this capacity. If there are several branches of the chain of title, it is usual to insert after the caption an explanatory note or table of contents, showing when the chain branches and when it is re-united. The explanatory notes or other data with reference to the various instruments abstracted should be inserted at the bottom of the sheet in question. Affidavits, or other papers, should be inserted at the appropriate point.

It is believed that a careful counsellor will ordinarily state an inability to give an absolutely reliable opinion as to the state of a title, unless the abstract submitted to him contains an express showing with reference to the matters which have been stated in the foregoing pages to be material to the abstractor's examination.

A well established practitioner can hardly afford to make title examinations at the rate of compensation generally charged, unless he has accumulated such a quantity of abstracts in previous work of this kind that the greater part of the research necessary in the preparation of new abstracts is eliminated. It is probably to the interest of the communities and the bar to encourage the formation of incorporated companies to perform this service; provided that this is limited to the guaranteeing that the records are as shown by an abstract, and an indemnity against loss from claims of persons other than a particular in-

dividual, and does not extend to the rendering of opinions upon legal questions.

In communities, where the volume of real estate transactions will not justify such companies or attorneys who specialize in this work to the exclusion of other practise, it would seem that the examination of titles and preparation of abstracts should be accomplished by the younger attorneys (who for various reasons can well afford to do it), and that these abstracts should be referred to an older attorney, for his opinion thereon as to the state of the title.

MISCELLANEOUS CAUTIONS.

1. In tracing the chain of title one should be very skeptical of a description of land solely by the name of the farm, or of the adjoining owners or of the street name and house-number, for these methods of identification are transient and unreliable. Even where the description is by metes and bounds, which is the correct means of description, if the computed acreage or the courses and distances vary in the several links of the chain, it is well to plat out according to a rough scale each tract, and verify the fact that they are substantially the same, or that one was carved from the other.

2. Where the land is newly developed city or suburban property, one must be sure that the supposed streets and alleys furnishing access are, in reality, public ways,[45] or else that the permanent right to use them goes with the land. Trouble of this kind is of frequent occurrence, because of the fact that real estate agents commonly believe themselves experts in real estate law, and frequently attempt to handle the legal matters incident to such developments. One must also be on the alert here to discover breaches of restrictive covenants in the deeds to such property.

3. An actual survey will often disclose the fact that the improvements, supposed to be on city property, actually trespass upon neighboring lands or upon the street. It is much better that this fault be detected and cured by proper quitclaims or or-

[45] Id., § 2510a for statutory dedication.

dinances before your client acts upon your advice, than that it be discovered afterwards.

4. When improvements have been recently completed, an abstractor might well recommend that receipts be secured from all material men and contractors, showing payment in full, so as to preclude the perfection of liens by them.

5. Where land has but lately descended to the present owner or to a predecessor, attention should be called to the situation which would exist if a will should be probated after the passage of title from the supposed heirs, and within the period of the statute.[46] It should also be noted that a deed from the heirs will not prevail over debts of the intestate,[47] if properly proven.

6. It must be remembered that the statute of limitations does not run against a widow's claim arising out of dower, until the death of the husband; and that equitable estates as well as legal estates are subject to dower.

7. The lien on real estate for unpaid poll taxes has been destroyed by a recent act [48] of the Legislature. This act is retroactive.

8. The knowledge of the abstractor of the existence of unrecorded claims is notice to his principal.

9. Inquiry need *not* be made as to possession, since, under our statute,[49] possession is not notice of an adverse claim.

10. Where land lies partly in one county and partly in another, or partly in a county and partly in a city, the records must be searched in both localities.

11. Corporate deeds should show on their faces that the execution thereof was by duly authorized officers. The directors of corporations may authorize conveyances of real estate, where trading or transferring of real estate is the principal object of the business of the corporation or a necessary incident thereof. In other cases authority for such conveyances should emanate from the stockholders.

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[46] Id., § 2547a.
[47] Id., § 2665.
[48] Acts 1918, page 635.
[49] Va. Code 1904, § 2465.

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